IN THE

Supreme Court of the United States.

OCTOBER TERM 1884.

No. 342.

PATRICK KIERNS,
Plaintiff in Error,

against

THE NEW YORK & HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendants in Error.

Brief for Plaintiff in Error.

ALFRED B. CRUIKSHANK,
Of Counsel for Plaintiff in Error.

ATWATER & CRUIKSHANK,
Attorneys for Plaintiff in Error.

INDEX.

	PAGE.
Statement of Proceedings	1
The Constitutional Questions Raised	5
Assignment of Errors	5
Character of plaintiff's premises and effect of defendants' trespasses thereon	6
History of defendants' road and of plaintiff's title	7
First Point.—The decision in the Muhlker case is controlling, and requires a reversal of this judgment	12
Second Point.—Following the Muhlker decision it must be held that the judgment of the New York Court of Appeals in this case contravenes the several provisions of the Federal Constitution, invoked by the plaintiff in error	14
Third Point.—The easements of light and air taken by the defendants were the actual property of the plaintiff	17
Fourth Point.—The New York Court of Appeals had no power to deprive these easements of their full value or character as property, and made no pretense of doing so by its decision herein	21
Fifth Point.—Easements in question were created by contract with the abutting owners	25

PAGE.

Sixth Point.—The erection of the elevated railroad on Fourth Avenue was a perversion of the use of that avenue from its original purpose..... 29

Seventh Point.—The defendants were not under compulsory obligation to erect the viaduct structure complained of..... 30

Eighth Point.—The Courts, particularly in New York State, are a unit in holding that an elevated railroad cannot be erected and operated by a private corporation on public streets without compensation to abutting owners.... 34

Ninth Point.—The only pretended justification for the appropriation of plaintiff's easements is the New York Act of 1892..... 40

Tenth Point.—The authority exercised by the Court of Appeals, under Chapter 339 of the New York Laws of 1892, to deprive plaintiff of her property without compensation, was repugnant to the Constitution of the United States..... 41

Eleventh Point.—The Constitutional provision for the protection of property and contracts should be liberally and faithfully enforced..... 45

Twelfth Point.—The judgment entered upon the decision of the New York Court of Appeals should be reversed.. 47

IN THE

Supreme Court of the United States.

PATRICK KIERNS,
Plaintiff and
Plaintiff in Error.

against

THE NEW YORK & HARLEM RAILROAD COMPANY and the NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendants and
Defendants in Error.

October Term.
No. 203.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of Proceedings.

This is one of the viaduct cases, involving the same questions as were decided in the Muhlker case in this Court April 10th last. The plaintiff's property is on the next block to the Muhlker property, and the title and history of the controversy are almost precisely the same. The case comes up

from New York upon a writ of error granted by Chief Judge Parker of the Court of Appeals, directing the Supreme Court to return here for review a judgment in equity entered upon a decision of the Court of Appeals reversing a judgment of the Appellate Division of the Supreme Court, First Department, State of New York, which affirmed a judgment in favor of the plaintiff and against the defendants, by which defendants were directed to pay to the plaintiff certain damages suffered by reason of trespasses upon his easements of light and air to his premises on Park avenue, New York City, with the alternative of an injunction against operating defendants' railroad upon the viaduct in question.

The action was begun September 23rd, 1897, and was in form an action to enjoin the maintenance and operation of the defendants' elevated and viaduct railroad in Fourth avenue. The complaint alleged title of plaintiff and possession of premises southeast corner of 114th street and Fourth avenue, New York City, and that the avenue has been since prior to 1870 a public street opened and established under the Act of 1813, the title whereof was acquired and held by the City in trust for street uses; that plaintiff as an abutting owner had easements of light and air appurtenant to said premises, and that the defendants had constructed and were operating a steam railroad over the surface of the avenue in front of said premises; that they had formerly excavated a cut in the street, and that they are now maintaining an elevated railway structure of steel and iron upon which their road is operated, whereby the easements of light, air and access appurtenant to said premises are interfered with and are likely to be permanently interfered with.

The answer, common to both defendants, admitted in a qualified way the street uses and trust as declared, but claimed a right to erect the structure and operate the road superior to said street rights; admitted its intention to permanently operate the road; set forth the history of the incorporation, and the agreement of the Board of Aldermen, hereinafter referred to; the widening of Fourth avenue in 1887 to one hundred and forty feet; the acquisition by defendants of the title and fee of a strip of twenty-four feet in the center of Fourth avenue, and the right to slope an embankment of its railroad structure thereon; the Act of May 14th, 1872, authorizing the making of a cut in the road-bed and the operation of the railroad therein, and the enactment of Chapter 339 of the laws of 1892, which authorized the erection of the viaduct structure in question. The answer also set up the Statute of Limitations and the prescriptive right to its present occupation of the street.

The case was tried before Mr. Justice Lawrence in November, 1900, and he made a decision and findings to the effect that prior to August, 1894, the road was operated along the centre of the avenue on a masonry embankment or viaduct about three feet high and fifty-six feet wide, bounded by parapet walls of stone (Third Finding, Record, p. 16), and that by virtue of user and occupation on the part of the defendants, and acquiescence by the plaintiff, and various legislative acts, the defendants had the right as against the plaintiff, to maintain and use the road as it was used prior to August, 1894. The Court then found in its Fifth Finding, that in compliance with and pursuant to Chapter 339 of the laws of 1892, and under the supervision of the Board for Park Avenue

Improvement, the present viaduct structure was erected, being about thirty-five feet high by about fifty-six feet wide, and that the New York Central Railroad began to operate its trains on that structure February 16th, 1897, and has since continued the same, and intends so to continue, and that said structure and operation are, and since February 16th, 1897, have been a continuous trespass upon plaintiff's easements of light and air appurtenant to said premises, and interference therewith and deprivation thereof, and thereupon granted a money judgment of $1,296 for past rental damage, and an injunction for the future against maintaining and operating the viaduct structure in front of plaintiff's premises with the alternative, at defendants' option, of obtaining a proper conveyance from plaintiff on payment of $2,525 fee damage to said premises. Upon that decision judgment was entered January 18th, 1901, in the Supreme Court of New York County, and upon defendants' appeal to the Appellate Division of said Supreme Court, which is the final tribunal in matters of fact in that State, the said judgment was affirmed.

Thereupon the defendants appealed to the Court of Appeals, where the judgment was reversed and the complaint dismissed without costs, upon the authority of the *Fries* case (169 N. Y., 270), and of the *Muhlker* case (173 N. Y., 549). This reversal was made upon the ground decided in the Fries and Muhlker cases, that under Chapter 339 of the laws of 1892 the defendant railroad companies were authorized to erect and operate the structure in question. Thereupon it appeared by the judgment of the Court of Appeals that certain constitutional questions had been raised in

that Court, and decided against the plaintiff-in-error and a writ of error was granted as aforesaid and the cause brought here for review.

The Constitutional Questions Raised by This Proceeding.

In the remittitur of the Court of Appeals containing its final decision in this matter, it is said (Record, p. 1).

> "That in said suit or action there was drawn in question the validity of Chapter 339 of the laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to Section 1 of Article XIV and the amendments thereto, and of Section 10 of Article I thereof; and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

Thus it conclusively appears that the constitutional questions and claims of plaintiff-in-error were before the Court below and were decided in a manner to justify a review thereof in this Court.

Assignment of Errors.

The assignment of errors (*Record*, pp. 63-66) is amply sufficient to bring up for review all the questions discussed in this brief. The grounds therein stated are that the Court of Appeals erred in dismissing the complaint and in holding that under the New York statute the plaintiff had no

remedy against the defendants, and that he might be deprived of his property without due process of law and without compensation and in sustaining as constitutional the statute, Chapter 339 of the laws of 1892, referred to, and in sustaining the authority exercised under said statute to take and appropriate plaintiff's property without due process of law and in sustaining the statute and decision, the effect of which was to deprive the plaintiff of said property, specifying the easements of light, air and access, and further erred in deciding that the defendants were under no liability to compensate the plaintiff, and in so deciding as to impair the obligation of the contract established by the deed in question, and in deciding that the defendants were protected from such liability to plaintiff by the authority of the statute.

Character of Plaintiff's Premises and Effect of Defendants' Trespasses Thereon.

The plaintiff's premises have a frontage of one hundred feet on Park avenue and extend seventeen feet five inches on 114th street. The building is a three-story house, occupied as a private dwelling for about fifteen years. The railroad runs opposite the third or fourth story. The evidence showed the usual interference with the easements; smoke, cinders, flashes of light caused by the escaping steam; noise, vibration, etc. There was a falling off in rental receipts of nearly one-half, and the decline of the fee value was estimated by experts at about $10,000. The judgment of the Court was for only one-quarter of that sum fee damage. It appeared upon the trial that since the erection and

operation of this viaduct it has been almost impossible to let or sell property in that neighborhood.

History of Defendants' Road, and of Plaintiff's Title.

In these respects this case is almost precisely on the same facts in the *Muhlker* case, decided in this Court April 10th, 1905.

By the laws of 1807, Chapter 115, a commission was appointed to lay out the streets of the City of New York, and to make and file a map thereof (Record, p. 22). A map was accordingly made and filed by these commissioners in 1811, and was put in evidence in this case (*Plaintiff's Exhibit "F"*, Record, p. 46). This map or plan was declared by the statute to be conclusive in respect to the City as well as to the owners and occupants of houses and tenements. A copy of the material parts of said statute is printed in the appendix to this brief.

The effect of a map prepared and filed as this one, has been before the New York Courts on more than one occasion, and it has been declared that the preparation and filing of such a map pursuant to legislative authority involves the dedication of the lands designated on the map to the corporate use of a municipality, or for the benefit of the corporation on whose behalf this map was filed.

Rochester & L. R. O. Co. v. N. Y. L. E. & W. R. R. Co., 110 N. Y., 128.
Suburban R. T. R. Co. v. Mayor, etc., of New York, 128 N. Y., 510.
Pocantico Water Works v. Bird, 130 N. Y., 249.

By the laws of 1813, Chapter 86, general provision was made for the laying out of streets in the City of New York. The material parts of that Act are also printed in the appendix, and it is therein provided that all such streets shall be impressed with a trust for city uses forever.

The land in question was at that time part of farm lands belonging to one Benson, and on November 19th, 1825, he made a deed to the Mayor, Aldermen and Commonalty of the City of New York, which was recorded December 26th, 1825, L. 196, p. 261, conveying certain strips of land laid out as streets on the map of the City of New York, and among others, Park, formerly Fourth avenue, of the width of one hundred feet in front of the premises in suit.

> "To have and to hold all and singular the said pieces or parcels of land, hereditaments and appurtenances and every part and parcel thereof, doth in and by these premises release and confirm unto the said parties of the second part, and to their successors, to the only proper use and behoof of the said parties of the second part and their successors, forever, in trust, however, that the same be appropriated and kept open as parts of public streets and avenues forever in like manner as the other public streets and avenues in the said city, are and of right ought to be."

On November 12th, 1828, a deed was made from Benson to Archibald Watt, which was recorded the same day in the Register's Office, New York County, in L. 241, p. 497, conveying the premises in question with others, partly by description and partly by reference to a map made by one Bridges, showing survey of September 25, 1825, and which

was filed at the same time that the deed was recorded. This Bridges map showed the streets in that neighborhood, including Fourth avenue, and the plaintiff's front thereon. The plaintiff derived title through said Benson.

Next in date is the charter of the defendant companies, Laws 1831, Chapter 263, which gave the company power to construct a single or double railroad from 23rd street to the Harlem River; to transport passengers and property "by the power and force *of steam or of animals* or of any mechanical or other power" for the term of thirty years, with power of condemnation of necessary real estate.

By said charter it was further provided as follows (Section 16):

> "Nothing in this act shall be deemed to authorize the said corporation to construct or use their single or double railroad or way *across or along* any of the streets or avenues as designated on the map of the city of New York, whether such streets or avenues shall have been opened or not, without the consent of the mayor, aldermen and commonalty of said city, who are hereby authorized to grant permission to the said corporation to construct their said rail-road or way *across or along said streets or avenues*, or prohibit them from constructing the same, and after the same shall be construed, to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same or any part thereof."

There was no hint of an elevated railroad in this charter; an old-fashioned surface road was alone indicated.

On December 16th, 1831, an ordinance was

passed authorizing the New York & Harlem Railroad Company to construct its railroad, and pursuant to that ordinance an agreement was made on January 9th, 1892, between the New York & Harlem Railroad Company and the City of New York wherein said ordinance was incorporated, by which the railroad company agreed "to stand "and abide by and perform all the conditions and "requirements in said ordinance contained" (Record, p. 50).

By this agreement the company is permitted, in pursuance of its charter, to construct a double or single track railroad or railroads along Fourth avenue, the width not to exceed twenty-four feet, *provided* that if it should appear that said railway constituted "an obstruction or impairment to the future regulation of the city *or the ordinary use of any street or avenue*, it might be required to remove the railway." The right of regulating the description of the power to be used was reserved to the city. Further, "that said company shall make the railroad path from time to time to conform to whatever may hereafter be the *regulation of the avenue or road* through which the railroad passes." If the railroad should not be completed or should be discontinued, the strip of land was to be thrown open as a part of the public avenue.

Everything is perfectly clear up to this time. The plaintiff's predecessors owned the premises fronting on Fourth avenue, which had been laid out, and though not opened, had been fully dedicated as a street. The city had taken a deed of the bed of the street in trust for street purposes, forever, so that it had been doubly dedicated to

street uses. The railroad company had a license merely to lay its tracks and operate its railroad along the surface of Fourth avenue. This occupation and operation of defendants' road was not inconsistent with the street use, and was not at that time considered to be thus inconsistent. The charter of the company allowed it to move its cars by either animals or steam power, and the trains operated in those early days were few in number, small in size, and caused the least possible inter-owners.

Now on January 18, 1832, the same Benson made a deed to the New York & Harlem River R. R. Company, which, however, was not recorded until August 18th, 1835, conveying to the railroad company a strip 24 feet wide, running through the centre of Park Avenue between 106th and 116th Streets. This deed was executed *seven years after* the deed by Benson to the city and was not recorded until *ten years thereafter*, and therefore it seems to us that it cannot have the slightest possible value in this case.

In 1835 a petition was presented to the Common Council of the City of New York, with the result that it was finally resolved in 1837 that measures be taken to widen the avenue to the width of 140 feet, and Chapter 274 of the laws of 1837, provided for that widening. In 1850 proceedings were inaugurated for the actual opening of Fourth Avenue, and commissioners were appointed, the report was confirmed by the Special Term, and finally affirmed by the General Term of the Supreme Court, June 20, 1854. A map is in evidence (*Plaintiff's Exhibit Q*, Record p. 47), which was filed as a part of said proceedings, and shows the street as one hundred and forty feet

wide and the railroad in the centre thereof twenty-four feet wide.

In 1872 by Chapter 702 of the laws of that year, the road was authorized to widen its track and to change the grade, which was done, so that in front of plaintiff's premises the road from 1872 to 1894 was upon a masonry embankment or viaduct about three feet high and about fifty-six feet wide, and bounded on both sides by parapet walls of stone having a height of six feet above the surface of the avenue. (*See Judge Lawrence's 3rd Finding, p. 16*).

This was the condition of the road and of the street on which the road was operated up to 1892, when this metallic viaduct complained of was erected under the pretended authority of Chapter 339 of the laws of 1892, the present structure being about thirty-five feet high, on which trains are run by defendants day and night on a line with the fourth story of the plaintiff's premises, seriously impairing his easements of light and air to his great pecuniary damage and the enrichment of defendants.

FIRST POINT.

The decision in the Muhlker case is controlling, and requires a reversal of this judgment.

The questions presented to this Court by the writ of error and assignment of errors are substantially the same as those presented in the *Muhlker* case. The remittitur from the Court of

Appeals in this case states the Federal question as follows:

> "That in said suit or action there was drawn in question the validity of Chapter 339 of the Laws of 1892, and the acts amendatory thereof and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly of Sec. 1 of Art. 14 and the amendments thereto, and of Sec. 10, of Art. 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

And the decision in this respect is made the ground of the application for the writ of error by the assignment of errors already referred to.

In the prevailing opinion of this Court, in the *Muhlker* case, it is stated, referring to the decision below:

> "The Court (of Appeals of New York) rests its ruling on one point, the effect of the Act of 1892, under which the structure complained of was erected, the Court declaring that Act a command to the railroad Company in the interest of the public; indeed made the State the builder of the new structure and use of it by the railroads mere obedience to law. But it does not follow that private property can be taken over by the erection of the structure or its use."

From this and the following language of the opinion in the *Muhlker* case it is clear and certain that the question decided in that case was the question attempted to be raised here; that is, the validity and constitutionality of Chapter 339 of

the Laws of 1892 of the State of New York. The facts in both cases were the same. In both cases the easements consisted of light and air appurtenant to premises fronting on Fourth avenue, New York City. In both cases these easements have been appropriated by the defendants without compensation, and in both cases that appropriation was attempted to be justified under Chap. 339 of the New York Laws of 1892, which directed the erection by defendants of a viaduct, in the course of which erection these easements were necessarily taken.

SECOND POINT.

Following the Muhlker decision, it must be held that the judgment of the New York Court of Appeals in this case contravenes the several provisions of the federal constitution invoked by the plaintiff in error.

The provisions of the Federal Constitution under which plaintiff in error claims the right to a review and a reversal in this Court are the two mentioned, namely, that no state shall pass any law impairing the obligation of contracts (Art. 1, Sec. 10), and that no state shall deprive any person of property without due process of law (Am. 14).

In this case the application of these several provisions is scarcely distinguishable. All three are intended and effective to protect property and

property rights. A contract is property, and all property, except that of the most primitive kind, is the result of contracts, and of services performed under contract. Substantially all property depends for its existence upon the performance of present contracts, and may be destroyed by their violation. The judgment under review sustained the validity of the state law (Chap. 339 of the Laws of 1892), which authorized the erection of the viaduct complained of, without compensation, and also sustained the acts performed and the authority claimed under it.

In the suit below there had been drawn in question the validity not only of the statute *but of the authority exercised under the same* (U. S. R. S., Sec. 709, Record, p. 1 Remittitur). By this authority exercised under the statute the property of the plaintiff was taken without compensation, and without process of law. It is not even pretended that compensation was provided, nor that there was any process of law whatever.

Now it has been held by the decision in the Muhlker case that the easements taken were in fact property. The opinion cites approvingly *Barnard* vs. *Johnson*, 15 *N. J. Eq.*, 481, and Lewis "*Eminent Domain*," Sec. 91-C where it is stated that

> "These rights or easements of light, air and access as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Similarly under the opinion in the *Muhlker* case, the effect of the New York Statute was to impair the obligation of a contract. It was held in that case that the City of New York held the street

under a trust which constituted a contract to the benefit of which plaintiff was entitled. The respective claims of the contending parties in the present case are practically the same as in the Muhler case. The *Kierns* property is on the southeast corner of 114th St. and Fourth Avenue, while *Muhlker's* property was on the northwest corner of 115th St. and Fourth Avenue. The title to both the properties is nearly the same. *Kierns* acquired under Benson; *Muhlker* under *Benson* and *Poillon;* and *Benson* had previously conveyed the fee to the bed of the street to the City of New York, in trust, for street uses, by deed recorded December 26, 1825.

This deed to the City in trust was the first deed made or recorded appearing in the record herein.

Seven years afterwards, *Benson* both in this case and in the *Muhlker* case attempted to convey to the Railroad Company a strip 24 feet wide, running through the centre of Park Avenue.

In both cases, therefore, that is to say, in this case and also in the *Muhlker* case, the plaintiffs and their predecessors in title, had purchased their land after Fourth Avenue had been doubly dedicated and contracted to street uses, and after contract that the street should be kept open for street purposes forever, and before the Railroad had acquired or claimed any rights whatever; and in both cases the parties had purchased under the assurance of a long line of New York decisions, which had declared and established the rights of abutting property owners upon the street, including the right to light, air and access, not as new doctrines but as ancient and natural rights.

THIRD POINT.

The easements of light and air taken by the defendants were the actual property of the plaintiff.

It appears to have been argued by the defendants counsel in the *Muhlker* case that these easements either were not property at all in the constitutional sense or that they were not the property of the plaintiff, and though in fact taken by the defendants as incidental to the building of the viaduct, yet the plaintiff was not thereby deprived of anything which he could call property and deprivation whereof would give him the right to appeal to this Court for constitutional protection.

This is a remarkable claim. Certainly these easements have all the attributes of property in the ordinary sense. They are capable of being used, enjoyed impaired and destroyed and under certain usual conditions of being transferred and exchanged. The mere fact that they have no value apart from the land does not detract from their quality as property. The roof may have only nominal value when considered apart from the house or when removed therefrom. The well and the water therein may have each but nominal value when separated or the shoe may be valueless without its mate and yet each of these is property and perhaps valuable property in its proper place. The circumstance that the values of certain kinds of property can only be measured by the effect of their loss, does not in the least prevent or recognize the reality of their values when so measured. A man's right hand may have no value apart from the body; its value is only

measured by its loss and yet it is none the less capable of legal ascertainment.

And not only is it clear that these easements constitute valuable property but that they are the actual property of the plaintiff. The first and in this case, the controlling proof on that subject is that the plaintiff and her predecessor in title had actually and notoriously possessed and enjoyed these easements as property and had derived revenue therefrom up to the time of the trespasses complained of. Is there any better prima facie proof of property rights than the notorious open and undisturbed and undisputed possession thereof? Such was the possession of plaintiff and predecessors of these easements from the year 1882 when this house was built, up to 1893 when the easements were taken by the defendants. During all that time the plaintiff and her predecessor had uninterrupted open and notorious enjoyment of these easements as property and was deriving large rents therefrom which are set forth in the record. Every passer-by, every agent of the defendants saw or might see this possession every day of his life.

And prior to that time the actual right to these easements existed as far back as the filing of the map by which the street was dedicated. And even prior to that time at the moment when this lot first became the subject of private ownership there was a potential right in the owner to an easement of light and air upon whatever street his property should thereafter face, this right being founded upon the very commonest habits and customs of civilization. And this property and its notorious enjoyment was never taken from plaintiff or from her predecessors or seriously

disturbed until defendants took it by the acts complained of here.

The defendant claims a prescriptive right to their railroad as actually used by them and that right as far as established is conceded; but what of plaintiff's right to these easements founded on not only in prescription but in actual possession?

The Court will look in vain for any assertion of a shadow of a claim on the part of defendants to interfere with those easements made prior to the passing of the act of 1892.

In 1807 the avenue was dedicated to the public use as a street by the statute (Laws 1807, Chap. 115).

In 1811 the map was filed pursuant to this statute, whereby the dedication of the street was perfected.

In 1825 Benson the owner of the land forming the bed of the Street deeded the same to the City of New York in trust for street uses.

In 1831 the railroad was allowed to lay its tracks and operate its road through the center of the street by the consent of the common council under what was practically a license. As was said by Judge Vann, in the *Lewis* case (162 N. Y. 221): "It entered under a license and remained under "a license. Its unbroken continuity of possession "from that day to this has never been accompan- "ied with an assertion of any claim hostile to the "city."

In 1832 the railroad condemned the strip of land twenty-four feet wide which was all it used at that time, and on which it operated a surface railroad only.

In 1853 the City condemned that strip and took the title to it under condemnation proceedings, the road being still a surface road.

In 1872 the legislature authorized a change of grade and a four track road.

Now from 1832 to 1872, a period of 40 years, this road had been operated as an ordinary surface railroad. Up to that time there had not been the slightest interference with plaintiff's easements of light and air appurtenant to these premises and very little interference with the access. It was the ordinary case of the operation of a surface railroad. Under the act of 1872 the tracks were sunk and access was interfered with, and the Courts have held that the easements of access then taken from the abutting owners were established by acquiescence and prescription and could not be recovered after twenty years enjoyment by the railroad company, but still the easements of light and air, the taking of which we now complain, had not been disputed. Plaintiff's building was erected in 1882 and plaintiff and the other tenants of these handsome apartments actually possessed and enjoyed those easements for ten years thereafter until this act of 1892.

Therefore they are not only plaintiff's property by right of title but by prescriptive right; by the best of all possible rights that of long notorious and undisputed possession and enjoyment under color of title.

On the defendants by every fundamental rule of law and evidence rests the burden of establishing their right to keep what they seized and took from us by the high hand in 1894; they cannot sustain that burden by mere reference to a State statute; of other defense there is none in this record.

FOURTH POINT.

The New York Court of Appeals had no power to deprive these easements of their full value or character as property, and made no pretense of doing so by its decision herein.

In the *Muhlker* case, defendants' counsel argued that the effect of the decision of the Court of Appeals was that under the local property laws of New York, plaintiff had no easements of light and air in these premises in 1892 capable of being taken by the defendants, and that by that decision this Court was foreclosed from examining into the facts and from deciding that plaintiff's property rights had in fact been invaded by the proceedings under the statute of 1892. Such a construction of the Constitutional provisions referred to would practically amount to their nullification or would permit such nullification or evasion at the option of the State authorities. The provisions of the Federal Constitution are that the State shall not pass any law impairing the obligation of contracts and that private property should not be taken for public use without just compensation, nor without due process of law. The remedy is not confined to cases where the State courts *admit* that the Constitution has been violated or deny its principles but extends to all cases where it has in fact been violated. Were it otherwise the Constitutional protection would be of little value.

If private property is in fact taken without process of law or without compensation the citizen is entitled to come to this Court for his rem-

edy even though the State Court may say that which has been taken is not in fact property.

Thus this Court will construe a contract in order to ascertain for itself whether it has been impaired under State authority notwithstanding the State Court construction to the contrary.

McCullough v. Commonwealth of Virginia, 172 U. S., 102.
Columbia Water P. Co. v. Columbia St. R. Co., 172 U. S., 475.

In both these cases it was held that it was the duty of the Supreme Court to look into the record to ascertain what in point of fact was done in the State Courts and whether the Constitution had in fact been violated in the matters complained of.

Here, as a matter of fact, the New York Courts have never for a moment pretended that these easements did not constitute property. The doctrine that easements of light and air appurtenant to real estate in the City of New York and elsewhere do constitute property for the taking of which all appropriate remedies may be had was thoroughly established in the elevated railroad case of *Story v. E. R. Co.*, 90 N. Y., 122, followed by *Lahr v. El. R. Co.*, 104 N. Y., 268, and by scores of reported and hundreds of unreported similar decisions in that State.

In the present case the trial Court found as a fact, that the plaintiff had owned during the period of her ownership as aforesaid, certain easements of light, air and access in Park avenue and appurtenant to her said premises (*decision, 1st paragraph, p. 16*), and that "the said permanent "structure and the operation of trains thereon "outside of the 24 foot strip are, and since Feb-

"ruary 16, 1897, have been, a continuous trespass "upon plaintiff's easements of light and air ap- "purtenant to said premises (*Decision, paragraph 5th, p. 17*). The value of the easements taken was also determined upon substantial evidence and the plaintiff was held entitled to judgment. That judgment was affirmed by the Appellate Division, four judges concurring. This determined the question of fact in the New York Courts.

The Code of Civil Procedure of the State of New York provides as follows (Sec. 191, Sub. Div. 3):

> "The jurisdiction of the Court (of Appeals) is limited to a review of questions of law."

While the Court of Appeals in this case handed down no opinion, yet the Federal Supreme Court, when necessary, will probably take judicial notice of the opinions in the *Muhlker* and other cases. In the *Muhlker* case Chief Judge Parker said, in the prevailing opinion:

> "Although at the time of the decision of the Lewis case we accepted as sound the proposition that when defendant commenced to use the steel viaduct it started a new trespass upon the rights of the abutting owners, for which it could properly be held liable, subsequent reflection persuaded the majority of the Court that this was error" (173 N. Y., 553).

and again

> We still think, under the authority of Radcliff's Executors *vs.* Mayor, etc., of Brooklyn, 4, N. Y., 195, and the other cases cited by Judge Martin in his opinion in the Fries case,

> that the city had power to make its improvement as it did, *without compensation to the abutting owner.*"

Similarly, in the case of *Fries vs. N. Y. & H. R. R. Co., 169 N. Y., 270,* which was the first of these cases where the right of the plaintiff to recover was denied or questioned, it is said in the prevailing opinion, p. 276;

> "I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement *for which the railroad was not responsible.*"

In the case of *Kierns vs. N. Y. & H. R. R., 173 N. Y., 642,* it was simply stated that the judgment was reversed upon the authority of the Fries and Muhlker cases. In the subsequent cases including this Birrell case there was no opinion. It is clear, therefore, that the decision of the Court of Appeals was placed upon the broad ground that the trespasses and the taking of the property of the abutting owners was justifiable, because done under the authority of the state law, and that that Court never attempted to deny the facts found by the New York Supreme Court of the value of the easements, or to modify those findings in any way. This is further shown, by reference to the dissenting opinions in the same Court. Three of the Judges, Bartlett, Vann and the present Chief Judge Cullen, wrote strong dissenting opinions, from the perusal of which it is evident that there was no doubt in the mind of any member of the

Court that the property was actually there and had been confiscated.

Judge Vann said that he regretted the result "as amounting to the confiscation of property belonging to abutting owners, and the gift thereof to railroad corporations". *Kierns case, 173 N. Y., 643.*

Defendants' claim therefore that the constitutional question was not and is not decisive of these cases is untenable.

FIFTH POINT.

The easements in question were created by contract with the abutting owners.

This point presents precisely the question decided in favor of the plaintiff in the Muhlker case (April 10, 1905). The deeds in the two cases are the same.

Benson's deed dated November, 1825, and recorded December 26th, 1825, conveyed to the City of New York the bed of Fourth Avenue in front of the premises in suit with *habendum* in trust that the same be appropriated and kept open as part of and in like manner with other public streets and avenues in said city. The deed to the railroad company was dated in 1832, seven years after and recorded April 18, 1835, ten years after the deed to the city. Under the recording act, therefore, the deed to the railroad company was void as to the City and those claiming under it. (*See Recording Act, N. Y. Revised Laws of 1813, vol. 2,*

p. 406; New York Revised Statutes, vol. 1, p. 756, Sec. 1.)

The city of New York had due legal authority to accept the deed from Benson to the city.

Vail v. *L. I. R. R. Co.*, 106 N. Y. 283, 287.

Hughes v. *Bingham*, 135 N. Y. 347, 352.

These deeds amounted to a contract and were within the protection of the clause of the Federal Constitution which provides that no State shall pass any law impairing the obligation of contracts.

Fletcher v. *Peck, 6 Cranch* (U. S.) 87, 136.

Dartmouth College v. *Woodward*, 4 Wheat. (U. S. 518, 656-7.)

McGehee v. *Mathis*, 4 Wall. (U. S.) 143, 155.

Farrington v. *Tennessee*, 95 U. S. 679, 683.

Further, we have the Act of 1807 (*Laws 1807, Chap. 115; p. 275*) providing that the Commissioners' plans, surveys and maps made pursuant to that Act should be final and conclusive in respect to both the city and the owners of lands within the boundaries of the streets "and in re- "spect to all other persons whomsoever", and this Act was declared to be a public act (*Laws 1807, p. 297*). Pursuant to that Act a map was filed by the said Commissioners, in 1811, which map officially established the streets and avenues of Harlem and represented Fourth Avenue as 100 feet wide (*Record p.* 47).

Following this is Chapter 86 of the Revised Laws of New York of 1813, which provides (*Vol. 2, p. 414*) that when lands in New York City are required for public purposes "the said mayor, "aldermen and commonalty of the City of New "York shall become and be seized in fee of all the "said lands * * * in trust, nevertheless, that "the same be appropriated and kept open for, or "as part of a public street, avenue, square or "place, forever, *in like manner as other public "squares and places in said city are and of right "ought to be.*"

The filing of this map representing the streets, as required by the statute of 1807, and followed by the provisions of the State law of 1813, above referred to, amounted to a dedication of these streets to public street uses forever and to a contract between the public and the abutting owners severally, that the strips of land represented on the map as streets should remain such perpetually, with all the incidents legally appertaining thereto and such has always been the law of the State of New York.

Story v. N. Y. El. R. Co., 90 N. Y., 122; see pp. 160, 172, 177.
Lahr v. Met. El. R. Co., 104 N. Y., 268; see p. 290.
Kane v. N. Y. El. R. Co., 125 N. Y., 164, 177.

These propositions are not seriously contradicted by the defendants. The complaint alleges that Park avenue was a public street opened and established as such, and that the title was held by the City of New York in trust for public use, with certain rights of easements therein set forth,

including easements of light, air and access (*Complaint pars. 3 and 4*). There is only a qualified denial of this in the answer, that is to say, a sort of a negative pregnant,—a denial that the *whole* of the strip of land known as Park avenue is now or ever has been a public street and alleging that it was subject to the rights of the defendants to operate their railroad. In none of the State courts has defendant attempted up to the present time to deny the general proposition that the effect of the street opening proceedings in the City of New York was to create a trust as claimed above by the plaintiff herein.

Next, we have in point of time, the agreement of January 9th, 1832, between the N. Y. & Harlem Railroad Company and the City of New York, which embodied the ordinance of the common council on December 22, 1831, distinctly recognizing the existence of Fourth avenue, that it was absolutely subject to regulation and control of the City authorities and that the railroad was to be there by sufferance only. The street rights and easements thus created were recognized and continued without any interference whatever down to 1872, because the use of Fourth avenue for the purposes of a surface road was not inconsistent with street uses and therefore did not legally constitute an interference with said easements.

In 1872 there was a change in the structure of the railroad under legislative sanction whereby the road was widened and there was a cut made in the street, and parapets were erected to guard the railroad tracks, constituting an interference with the easements of access but of comparatively slight interference with the easements of light and air and said easements of light and air remained undisturbed until 1893 or 1894 when they were ap-

propriated by the defendants in the manner complained of in this case.

SIXTH POINT.

The erection of the Elevated Railroad on Fourth avenue was a perversion of the use of that avenue from its original purpose.

In the *Story* case (90 N. Y., 122, 156) the Court referring to the elevated structure on Pearl street, said: "There was no change in the street surface "intended; but the elevation of a structure use- "less for general street purposes, and as foreign "thereto as the house in Vesey street (*Corning v. "Lowerre,* 6 Johns, Ch. 439) or the freight depot "(*Barney v. Keokuk, supra*)."

In the *Lahr* case (104 N. Y., 268, 288) the Court said that such elevated railroad "is a perversion of the use of the street from the purposes originally designed for it."

So in the *Kane* case (125 N. Y., 164, 176) Judge Andrews in referring to the *Story* case, declared that that decision held and that an elevated railroad "was obstructive of the street uses for which "streets are established."

In the *Fobes* case (121 N. Y., 505) Judge Peckham said at p. 517 "Such a permanent, total, ex- "clusive and absolute appropriation of a portion "of the street as this structure amounted to was "held to be illegal and wholly beyond any legiti- "mate or lawful use of a public street" (referring to the *Story* case.)

Finally, in the *Muhlker* case, decided in this Court April 10, 1905, these decisions are approved and enforced, the Court saying that the *Story* and *Lahr* cases are in point and decisive (*Opinion, McKenna, J.*).

SEVENTH POINT.

The defendants were not under compulsory obligation to erect the viaduct structure complained of.

The learned counsel for the defendant, and a majority of the Judges of the Court of Appeals, were in error in supposing, as they seem to have supposed, that under Chap. 339 of the New York Laws of 1892, the defendants were actually compelled to erect the viaduct structure provided for by that act. The provisions thereof though in form a *command,* were in effect a *permission.*

In the construction of statutes it frequently happens that the word "may" means "shall"; that is to say, that words of permission are to be construed in a proper case as words of compulsion; and so in statutes like the present, granting a monopoly or advantage upon specified terms. the directory or mandatory words used in stating the *terms* of the permission are to be construed together *with* the permission, and as stating merely the conditions thereof.

It was treated as a permission by the company from the beginning.

The payments for the structure were made half

by the defendant Railroad Companies and half by the city, *from time to time* as the work progressed, so that in the construction of the road the defendant company took a voluntary part.

It is not to be assumed that there was an absolute necessity requiring the defendants' railroads to be operated in Fourth Avenue; there was no absolute necessity for the continuance of their depot at 42nd Street. Their terminal could have been removed to 135th Street, north of the Harlem River, with possible advantage to the people of the city. When the station at 42nd Street was originally established it was in the upper part of the residential quarter; as far uptown comparatively, as a station at 135th Street would now be. It was therefore a decided advantage to the Company to be allowed to construct this viaduct as a condition of continuing to occupy its station in Forty-second Street, and to operate its trains therefrom, instead of being required to go off Manhattan Island altogether, as it might and perhaps should have been at that time.

The statute amounted to an offer by the Legislature of New York, to be accepted by the Railroad Company or rejected as it saw fit. It probably required the Railroad Company to vacate the surface of the street which they had previously occupied, but there was no power in the Legislature to compel the Railroad Company to construct a viaduct there, nor to compel it to accept and use the same when constructed. The only penalty which could have been inflicted upon the Railroad Company, in the case of its declining to accept the proposed scheme, would have been a refusal by the State to allow it longer to continue to occupy Fourth Avenue. It was occupying the street sur-

face under a license from the Legislature and the City authorities, and the effect of the statute was to terminate that license, and to offer a new license for the use of the viaduct structure, upon the terms stated in the Act, including payment by the Railroad Company of half its cost.

That this Act of 1892 was drawn in the interest of the Railroad Company and probably by the Company's officials is evident from a mere reading of the details of the proposed work therein carefully and scientifically set forth. The facts also show that the servants of the road actually supervised the construction. Mr. Katte, a civil engineer in the employ of the Railroad Company, was one of the commissioners and superintending engineer of this work, and as such prepared the plan for the elevation of the tracks (*Record, p. 46*); Mr. Naylor, another civil engineer in the defendant's employ, was the employee of the Board for the Park Avenue Improvement (*Record, p. 44*), and there were probably others.

Upon the completion of this viaduct it was to be the property of the defendant companies, although they had paid but half of its price, and they were clothed with a monopoly of the use thereof, to the exclusion of all other railroads and persons whatsoever.

"Said improved structure and bridge shall be "*exclusively for the uses and purposes of the* "*Railroad Company* (Sec. 24). "No trains of "other companies, without such permission (of the defendants) shall be run thereon." (Sec. 26).

The command of the Act of 1892 to the defendants was *first* to vacate the surface of Fourth avenue. That command was probably within the power of the Legislature, but whether it was so or not does not concern the plaintiff. The *next*

command or permission was to contribute one-half of the price of the proposed viaduct structure in Fourth avenue which was to be used for the sole benefit of the defendants. In that scheme defendants could not be compelled to join. No doubt it was well understood in advance that the scheme was of their contriving or was known to be acceptable to them. By contributing to the construction and accepting the benefits of the plan, and by appropriating the plaintiff's easements in the operation of said scheme, the defendants adopted the responsibility thereof and ought not to be heard to disclaim it.

As was stated by *Judge Cullen* in his dissenting opinion in the *Fries* case "The situation in no "way differs from that which would have been "presented had the Legislature turned the Rail-"road Company off the street altogether, and "made it construct a new line on adjoining prop-"erty. In either case the Railroad would be "bound to pay for what it took."

To put it in another way: If the command of the statute was in substance to defendants to appropriate plaintiff's easements without compensation, then it was illegal and immoral, and they were not bound to obey it. If, on the contrary, the command was, as *Judge Cullen* intimates, upon the theory that they were to pay for the property they took in executing it, then there can be no defense to this action.

EIGHTH POINT.

The Courts, particularly in New York State, are a unit in holding that an elevated railroad cannot be erected and operated by a private corporation on public streets, without compensation to abutting owners.

It is unnecessary to argue this point at length as it will have to be conceded by the defense. A few extracts, however, from a multitude of decisions, mostly in New York courts, will tend to illustrate how this doctrine has been emphasized and enforced:

In the *Story* case, speaking of the power of the Legislature to authorize an elevated railroad structure in a street, Danforth, J., said (90 N. Y., 122, 160):

> "*This cannot be done even by the Legisla-*
> "*ture without compensation to the abutting*
> "*owner.* It would be a perversion of law and
> "reason to construe a trust to keep open land
> "for street purposes as subject to such regu-
> "lations as would destroy the street, or en-
> "able the Legislature or municipality to
> "grant away an exclusive right to any part
> "of it."

On the same subject Tracy, J., declared that the Legislature by virtue of its power to regulate and control the public uses of a street could not divert them to the construction and maintenance of an elevated railroad. He said (90 N. Y., 169):

"This is *a question of power*. If the Leg-
"islature has the power to authorize such a
"structure, without compensation, its exer-
"cise cannot be regulated by the Courts. If
"one road may be authorized to be construct-
"ed upon two series of iron columns placed
"in the street, another may be authorized to
"be supported upon brick columns or upon
"brick arches spanning the street. If a su-
"perstructure may be authorized which spans
"the entire carriageway at fifteen feet above
"the bed of the street, one may be authorized
"which spans the entire street from building
"to building, thus excluding light and air
"from the street and from the property abut-
"ting thereon."

He further says (p. 171):

"The defendant's railroad as authorized
"by the Legislature, directly encroaches upon
"the plaintiff's easement and appropriates
"his property to the uses and purposes of a
"corporation. This constitutes the taking of
"property for public use. It follows that
"such a taking *cannot be authorized*, except
"upon the condition that the defendant makes
"compensation to the plaintiff for the prop-
"erty thus taken."

He also quoted from the opinion of the Supreme Court of the United States in *Railroad Company* v. *Schurmeir* (7 Wall., 272), where that Court says:

"Attempt is also made to justify the acts
"of the respondents (the railroad company)
"as grantees of the State, upon the *ground*
"that the complainant, in dedicating the
"premises to the public as a street, levee and
"landing, parted with all his title to the same,
"and that the entire title vested in fee in the

"State. Respondents rely for that purpose "upon the statute of the Territory of Minne- "sota. Suppose the construction of that pro- "vision assumed by the respondents, is cor- "rect, it is no defense to the suit, because it is, "nevertheless, true that the municipal cor- "poration took the title in trust, impliedly, if "not expressly, designated by the act of the "party in making the dedication. *They could "not, nor could the State,* convey to the re- "spondents any right to disregard the trust, "or to appropriate the premises to any pur- "pose which would render valueless the ad- "joining real estate of the complainant."

Tracy, J., further added, with reference to the power of the Legislature (90 N. Y., 177):

"The obligation to preserve it as an open "street rests in contract written in the statute "under which the lands were taken, and "which may not be violated by the exercise "of any legislative discretion."

In *Mahady v. The Bushwick Railroad Co.,* 91 N. Y., 148, 153, Andrews, C. J., said with reference to the effect of the *Story* case:

"The plaintiff, though an abutting owner "simply, the fee of the street being in the "city, was entitled to the use of the street, "and neither the Legislature nor the city "could devote it to purposes inconsistent "with street uses, without compensation, ac- "cording to the principle of Story *v.* The "Elevated Railroad Co., 90 N. Y., 122."

In the *Lahr* case (104 N. Y., 268, 288) Ruger, J., declared that the appropriation of a public street for an elevated railroad "is a use which neither the city authorities nor the Legislature

can legalize or sanction without providing compensation for the injury inflicted upon the property of abutting owners."

As to the power of the Legislature over city streets and their regulation for street use, RUGER, C. J., decided in the *Lahr* case, 104 N. Y., 268, 292:

> "The logical effect of the decision in the "*Story* case is to so construe the Constitution "as to operate as a restriction upon the legis- "lative power over the public streets open- "ed under the Act of 1813, and confine its "exercise to such legislation as shall author- "ize their use for street purposes alone. "Whenever any other use is attempted to be "authorized, it exceeds its constitutional "authority. Statutes relating to public "streets which attempt to authorize their "use for additional street uses, are obviously "within the power of the legislature to enact, "but questions arising under such legislation "are inapplicable to the questions here in- "volved."

With reference to the legislative power to authorize the construction of an elevated railroad in the city street, Ruger, C. J., further declared in the *Lahr case,* 104 N. Y., 268-295:

> "The Legislature, as we have seen, had not "power to authorize the street to be used for "an elevated steam railroad, and that want "of authority extends to every incident nec- "essary to make the road an operative ele- "vated steam railroad, which occasions in- "jury to the rights of abutters on the "street."

In the *Kane* case, speaking of the power of the

Legislature over the city streets, and of the limitation upon that power, Andrews, C. J., said (125 N. Y., 183):

> "We have, then, an express and deliber-
> "ate legislative declaration of a trust in re-
> "spect to all the streets owned by the city,
> "however or whenever acquired, that they
> "shall forever be kept open as public streets,
> "upon faith of which owners of abutting
> "property have, or are presumed to have,
> "acted in improving and building thereon.
> "Can the Legislature abrogate this trust, or
> "authorize its violation without making
> "compensation for any injury sustained by
> "abutting owners? Justice requires a nega-
> "tive answer, and we think it may be proper-
> "ly said that the acceptance and acting upon
> "this trust by owners of abutting property
> "creates in them a right which the law will
> "enforce to have and enjoy the advantages
> "and incidents of a public street, in connec-
> "tion with their property, of which the Leg-
> "islature cannot deprive them without com-
> "pensation."

In the *Fobes* case, 121 N. Y., 505, 518, Peckham, J., referring to the facts, declares in the *Story* case as saying:

> "A plain, palpable and permanent misap-
> "propriation of the street or some portion of
> "it to the exclusive use of the defendant cor-
> "poration, and as resulting from it, the
> "Court held that there was a taking of prop-
> "erty belonging to the plaintiff without com-
> "pensation, which no Legislature could au-
> "thorize or legalize."

In the *Reining* case (128 N. Y., 157, 167), Andrews, J., declared that:

> "The Legislature cannot legally authorize

"structures for railroad purposes to be "erected therein for the use and convenience "of railroads, which practically exclude the "abutting owners from the part of the street "so occupied without compensating them for "the injury suffered."

In Abendroth v. *Manhattan Ry. Co.* (122 N. Y., 1) the Court said:

"An owner of a lot adjoining a city street, "although his title extends only to the side "of the street, and he has no ownership of "the land or interest therein, save as abut- "ting owner, has incorporeal private rights "therein, which are incident to his property, "and which may be so impaired as to entitle "him to damages. Such rights are private "property within the provisions of the State "Constitution (Art. 1, § 6) which forbid the "taking of private property for public use, "without just compensation."

In *Kane* v. *N. Y. Elevated R. R. Co.* (125 N. Y., 165), the Court said:

"The owners of lots abutting on a city "street, the fee of which is in the municipal- "ity, have, by virtue of proximity, special "and peculiar rights, facilities and privi- "leges therein in the nature of easements, "which are not common to the citizens, and "constitute property of which they cannot be "deprived by the Legislature or the munici- "pality, or both, without compensation; and "any use of such street inconsistent with its "use as a public street which interferes with "these easements, is a taking of property, "for which said owners are entitled to com- "pensation to the extent of the damages oc- "casioned thereby."

In *Egerer* v. *N. Y. C. & H. R. R. Co.* (130 N. Y.,

115), the above decisions were approved and applied to a case where under an Act of the Legislature a street in Rochester had been partially closed for the purpose of elevating railroad tracks and the railroad company previous to the time of discontinuing the street had acquired the fee of the same for railroad purposes subject to its use by the general public.

NINTH POINT.

The only pretended justification for the appropriation of plaintiff's easements is the New York Act of 1892.

We are thus brought to the conclusion as stated in the above heading, that the only possible pretense of justification for the taking of the plaintiff's easements, is to be found in the Act of 1892. We have seen how these easements were created; we have seen that they existed and had been enjoyed by her and her predecessors in title for over half a century prior to 1893; and we have seen that a private corporation could not have appropriated them without compensation. The defendants, however, claim that they were justified in this appropriation by Chapter 339 of the Laws of 1892, which they set up in their answer. There is nothing else left of the defense. The condemnation proceedings against the infant Benson, by which defendants acquired the twenty-four foot strip are of no consequence in the case as presented, be-

cause they were allowed by the decision of the trial Court the use of this strip to the fullest extent claimed by them. Neither can they plead the *erection* of the viaduct by the State as a partial defense because there has been no recovery in this case for that erection, nor even for the operation of it, as long as the State assumed any control whatever, namely, for the three years during which the erection was progressing from 1894 to 1897. For the trespasses which the defendants are daily committing upon plaintiff's property their only shield is the State Statute of 1892.

TENTH POINT.

The authority exercised by the Court of Appeals under Chapter 339 of the New York Laws of 1892 to deprive plaintiff of her property without compensation, was repugnant to the Constitution of the United States.

It is not necessary in this case for this Court to decide the question whether the Act of 1892 was or was not unconstitutional. That Act nowhere states that the railroad companies shall be free from the obligation of paying for the easements they have appropriated, and this is pointed out in the Fries case by the able *dissenting opinion* of Judge Cullen. This writ of error is granted under the Act of Congress which provides for a review, where either the statute *or the authority* exercised thereunder is repugnant to the Constitu-

tion of the United States. And the record in the Court of Appeals shows that that was the question raised before it, for it reads: "That in the said "suit or action there was drawn in question the "validity of Chapter 339 of the laws of 1892 and "the acts amendatory thereof *and of the authority "exercised thereunder* on the ground of their be- "ing repugnant to the Constitution of the United "States."

The statute provided for the erection of an elevated railroad. The Supreme Court of the State of New York held that plaintiff was entitled to compensation for the property taken in the construction of the road. The Court of Appeals held otherwise, and that because the State had commanded the erection, plaintiff was not entitled to such compensation. It is this *decision of the Court of Appeals* that we seek to have reversed. It is that *authority exercised under that Act* that we seek to have overruled in this case.

This authority was exercised in a manner violative or repugnant to the Constitution, because it took plaintiff's property without the opportunity for a hearing or any pretense of such an opportunity.

Notice of hearing or an opportunity to be heard are necessary elements of due process of law.

Roller v. Holly, 176 U. S., 398, 409.
Carson v. Brockton Sewerage S., 182 U. S., 398, 401.

Due process of law also included provision for compensation for property taken.

Chicago, Etc., R. Co. v. Chicago, 166 U. S., 226, 236, 241.

Tindal v. Wesley, 167 U. S., 204, 222, 223.
Holden v. Hardy, 169 U. S., 366, 390-1.
Norwood v. Baker, 172 U. S., 269, 277.

Further, it is to be said that the prohibition in the Fourteenth Amendment applies to all instrumentalities of the State, its legislative, executive and judicial authorities.

Chicago, Etc., R. C. v. Chicago, 166 U. S., 226, 233, 234.
Scott v. McNeal, 154 U. S., 34, 35.

The legislature has no power to abrogate the trust created by the dedication of land for public purposes except upon making compensation.

Railroad Co. v. Schurmeir, 7 Wall (U. S.), 272, 289, 290.
U. S. v. Ill. Central R. Co., 2 Biss. (U. S.), 174, 181.
Packet Co. v. Sorrels, 50 Ark., 466, 473.
Canastota Knife Co. v. Newington Tramway Co., 69 Conn., 146, 172.
City of Jacksonville v. Jacksonville R. Co., 67 Ill., 540, 543.
City of Chicago v. Ward, 169 Ill., 392, 412.
Warren v. The Mayor, 22 Iowa, 351, 356.
Franklin Co. v. Lathrop, 9 Kan., 453, 463.

Schurmeir v. St. Paul R. Co., 10 Minn., 82, 105. Affd. 7 Wall (U. S.), 272.

City of St. Paul v. Chicago R. Co., 63 Minn., 330, 352.

Belcher Sugar Ref. Co. v. St. Louis Co., 82 Mo., 121, 125-6.

Cummings v. St. Louis, 90 Mo., 259, 263-4.

City v. Laverack, 34 N. J. L., 201.

Trustees v. Mayor, 19 N. J. Eq., 355, 357.

Methodist Episcopal Church v. Penn. R. Co., 48 N. J. Eq., 452.

LeClercq v. Gallipolis, 7 Ohio, 217.

Board of Education v. Edson, 18 Ohio St., 221, 225.

Portland R. Co. v. City of Portland, 14 Oregon, 188, 197.

Lamar Co. v. Clements, 49 Texas, 348.

Penn. v. Wheeling Bridge Co., 13 How. (U. S.), 518.

Bridge Proprietors v. Hoboken Co., 1 Wall (U. S.), 116, 144-5.

The Binghamton Bridge, 3 Wall (U. S.), 51.

Finally, the proposition at the head of this point has been finally and conclusively decided as there stated by this Court in the Muhlker case (April 10, 1905).

ELEVENTH POINT.

The constitutional provisions for the protection of property and contracts should be liberally and faithfully enforced.

This is a flagrant instance of a violation of property and contract rights. The defendants, under pretended color of authority by the legislature, entered on a public street and appropriated and destroyed valuable property belonging to scores of private individuals, bringing them in many cases to the verge of ruin. The facts were notorious, and were, moreover, proven convincingly in the Courts and before judges having full knowledge of the local situation. A dozen different Supreme Court Justices of the highest character and familiar with the locality, found the facts as the property owners claimed, and gave solemn judgment that they had actually suffered the grievances they complained of, and were entitled to redress in damages. The State Court of Appeals, following a line of unbroken decisions, affirmed the principle and the judgment in the first case before it. And then, at last, the same Court of Appeals, by a bare majority vote, reversing itself, tells the injured property owners and contract owners, that they have no right to demand any redress or compensation whatever; that the State law has abrogated the contract on which they relied, and has decreed that property which they and their predecessors have possessed for half a century shall be taken from them without compensation. Now when they come here, they are told by the defendants' learned

counsel that as the State Court must be supposed to have decided justly, therefore the presumption is conclusive that these plaintiffs never had any property or contract rights of which they could be deprived. In the State Courts plaintiffs are told, yes, the defendants have taken your property, but they did it by command of the State, and you have no redress; and when they appeal to this Court and ask if that is really the law, then they are told by the same defendants at this Bar that they never had any easements and were never deprived of any, and when, in reply, they turn to the record and the findings of the Court, showing that they actually had this property, and that they lost it, and what damages they have sustained, and what the evidence shows, and what the State Courts themselves found and decided to be the fact, they are answered that this Court must not examine the findings, but must assume that the New York Court of Appeals did exactly the contrary of what it actually did, and what it said it did, and what it openly claimed it did when it decided these cases. Justice would indeed be blind if such a plea could be successful.

If whenever the action of the State authorities is brought here for review upon a claim that they have taken property without compensation, it is to be a sufficient answer that there is a conclusive presumption of law that the State authorities did right, and that there was in fact no property to be paid for notwithstanding the facts and notwithstanding the findings of the State Courts themselves, then the right of review in such cases and the constitutional safeguard are practically valueless.

The true rule requires and plain justice re-

quires this court to look into the record and see what the facts are as found by the court below and as they appear uncontradicted upon the record and acting upon those facts, to give contracts and property rights the protection which the Constitution guarantees.

In *Murray* v. *Charleston*, 96 U. S., 432, 448, it was said: "There is no more important provision "in the federal constitution than the one which "prohibits States from passing laws impairing "the obligation of contracts, and it is one of the "highest duties of this Court to take care that "the prohibition shall neither be evaded nor frit-"tered away. Complete effect must be given to it "in all its spirit. The inviolability of contracts, "and the duty of performing them as made, are "foundations of all well ordered society and to "prevent the removal or disturbance of these "foundations, are one of the great objects for "which the Constitution was framed."

TWELFTH POINT.

The judgment entered upon the decision of the New York Court of Appeals should be reversed.

ALFRED B. CRUIKSHANK,
Of Counsel for plaintiff in error.